5

(1)

Supreme Court, U.S.
FILED

No. _____ 08-785 DEC 16 2008

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MARIA SOCORRO AGASINO,

Petitioner,

v.

MICHAEL MUKASEY, Attorney General of the United States, MICHAEL CHERTOFF, Secretary of Homeland Security, COUNTY OF SANTA CLARA SUPERIOR COURT-STATE OF CALIFORNIA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT L. REEVES
Counsel of Record
REEVES & ASSOCIATES, APLC
2 North Lake Avenue, Suite 940
Pasadena, CA 91101
Tel: (626) 795-6777
Fax: (626) 795-6999

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether the Ninth Circuit Court of Appeals violated Due Process of Law under the Fifth Amendment to the U.S. Constitution in failing to consider arguments respecting Equal Protection in rehearing Petitioner's case when those arguments had been the basis for its original decision.

(2) Whether it violates Equal Protection of law guaranteed through the Fifth Amendment's due process clause to preclude an individual from seeking relief under Immigration and Nationality Act § 212(c) [8 U.S.C. § 1182(c)] because that individual was not deportable when she pled guilty, even if she later became deportable and similarly situated individuals were permitted to obtain that relief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
A. Preliminary Case Facts	5
B. Administrative Proceedings	6
C. District Court/Petition for Writ of Habeas Corpus	7
D. Ninth Circuit Appeal	8
REASONS FOR GRANTING THE PETITION	11
I. Review Is Warranted Because the Ninth Circuit's Decision to Overturn the Previous Holding it Made in Petitioner's Case Violates Due Process and Is Contrary to the Accepted Course of Judicial Proceedings	11

TABLE OF CONTENTS – Continued

Page

II. Review Is Warranted Because this Case Involves a Violation of Equal Protection Principles Under the Due Process Clause of the U.S. Constitution and Involves an Important Question of Federal Law that Has Not Been Previously Decided by this Court 15

CONCLUSION 19

APPENDIX

Orders Respecting Judgment Sought to be Reviewed

A. Memorandum Decision of the Ninth Circuit Court of Appeals, denying Petitioner's appeal after rehearing, dated May 5, 2008 ..... App. 1

B. Memorandum Decision of the Ninth Circuit Court of Appeals, granting Petitioner's appeal, dated August 16, 2005 ..... App. 7

C. Decision of the U.S. District Court for the Northern District of California, denying Petitioner's Petition for Writ of Habeas Corpus, dated April 16, 2004 .... App. 10

Related Orders/Administrative Orders

D. Decision of the Board of Immigration Appeals, denying Petitioner's Administrative Appeal, dated October 25, 1999 ..... App. 28

TABLE OF CONTENTS – Continued

Page

E. Order of the Immigration Judge, pretermitting relief from removal, dated May 20, 1999 ..... App. 31

F. Transcript of Hearing, and Bench Decision, dated May 20, 1999 ..... App. 34

Orders Respecting Rehearing

G. Grant of Petition for Rehearing for the Appellees from the Ninth Circuit Court of Appeals, dated May 5, 2008 ..... App. 50

H. Denial of Petition for Rehearing for the Appellant from the Ninth Circuit Court of Appeals, dated September 17, 2008 .... App. 51

TABLE OF AUTHORITIES

Page

CASE LAW

JUDICIAL CASES:

Alvarez-Barajas v. Gonzales, 418 F.3d 1050 (9th Cir. 2005) 9

Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004) 17

Cordes v. Gonzales, 421 F.3d 889 (9th Cir. 2005) 9, 10, 12, 13, 18

Cordes v. Mukasey, 517 F.3d 1094 (9th Cir. 2008) 10

Francis v. INS, 532 F.2d 268 (2nd Cir. 1976) 16, 17

Garberding v. INS, 30 F.3d 1187 (9th Cir. 1994).....16

INS v. St. Cyr, 533 U.S. 289 (2001) 8, 17

Larita-Martinez v. INS, 220 F.3d 1092 (9th Cir. 2000) 13

Reno v. Flores, 507 U.S. 292 (1993) 16

Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206 (1953) 12

Sudomir v. McMahon, 767 F.2d 1456 (9th Cir. 1985) 16

U.S. v. Velasco-Medina, 305 F.3d 839 (9th Cir. 2002) 8, 15, 17, 18

Wo v. Hopkins, 118 U.S. 356 (1886) 15

TABLE OF AUTHORITIES – Continued

Page

ADMINISTRATIVE CASES:

In re Silva, 16 I. & N. Dec. 26 (BIA 1976) 16

STATUTES

Immigration and Nationality Act ["INA"] Section 8 of the U.S. Code

INA § 101(a)(43) [8 U.S.C. § 1101(a)(43)] 5

INA § 211(b) [8 U.S.C. § 1181] (1995) 3

INA § 212(c) [8 U.S.C. § 1182(c)] (1995) .....*passim*

INA § 237(a)(2)(A)(iii) [8 U.S.C. § 1227(a)(2)(A)(iii)] 6

INA § 240A(a) [8 U.S.C. § 1229b] 6, 7

INA § 241(a)(2)(A)(i) [8 U.S.C. § 1251(a)(2)(A)(i)] (1995) 4

INA § 241(a)(2)(A)(ii) [8 U.S.C. § 1251(a)(2)(A)(ii)] (1995) 4

INA § 241(a)(2)(A)(iii) [8 U.S.C. § 1251(a)(2)(A)(iii)] (1995) 4

INA § 241(a)(2)(B) [8 U.S.C. § 1251(a)(2)(B)] (1995) 4

INA § 241(a)(2)(C) [8 U.S.C. § 1251(a)(2)(C)] (1995) 4

INA § 241(a)(2)(D) [8 U.S.C. § 1251(a)(2)(D)] (1995) 4

INA § 242 [8 U.S.C. § 1252] 9

TABLE OF AUTHORITIES – Continued

Page

Section 28 of the U.S. Code

28 U.S.C. § 1254 2

28 U.S.C. § 1291 9

28 U.S.C. § 2241 ..... 7, 9

California Penal Code ("CPC")

CPC § 424 5

CPC § 487(b)(3) 5

MISCELLANEOUS

Antiterrorism and Effective Death Penalty Act ["AEDPA"], Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996)

AEDPA § 440(d) 4, 17

Illegal Immigration Reform and Immigrant Responsibility Act ["IIRIRA"], Pub. L. No. 104-208, 110 Stat. 3009-546 (September 30, 1996)

IIRIRA § 304(b) 4

IIRIRA § 321(a)(3) 5

REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005) 9

REAL ID § 106(c) 9

U.S. Constitution ("U.S. CONST.")

U.S. CONST. 5th Amendment 3, 10, 11, 13, 15

U.S. CONST. 14th Amendment ..... *passim*

OPINIONS BELOW

Proceedings in this case were commenced in the Administrative and District Courts. They began in the Immigration Court and Board of Immigration Appeals, where they were known under the name *Matter of Agasino*, A092 177 125; the Board of Immigration Appeals never published its decision in the case and no cite was assigned for that reason. The District Court case, filed in the District Court for the Northern District of California, was assigned the name *Agasino v. State of California, et al.*, 00-cv-2253 (April 2004), but has no other citation. Copies of these District Court and Administrative Decisions are attached in the Appendix (hereinafter "App." [App. at 10-49.]).

The Ninth Circuit Court of Appeals, the court directly below, initially granted Petitioner's appeal and Petition for Writ of Habeas Corpus; that opinion is reported as *Agasino v. Chertoff*, 142 Fed.Appx. 309 (9th Cir. August 25, 2005). It is attached in the Appendix. [App. at 7-9.]

Later, however, the Ninth Circuit Court of Appeals granted a petition to rehear Petitioners' case, in *Agasino v. County of Santa Clara, et al.*, 2008 U.S. App. LEXIS 9823 (May 5, 2008). [App. at 50.] After rehearing, the appeal was denied, *Agasino v. County of Santa Clara, et al.*, 2008 U.S. App. LEXIS 9824 (May 5, 2008). [App. at 1-6.]

Upon denial of her appeal, Petitioner also filed a Petition for Rehearing. That decision was not published, but it is attached in the Appendix. [App. at 51.]

JURISDICTION

This Petition for Writ of Certiorari is before the Supreme Court pursuant to direct appeal of the Ninth Circuit Court of Appeals' memorandum decision, dated May 5, 2008, in which it denied Petitioner's appeal. Petitioner filed a petition to rehear that case and decision; the petition for rehearing was also denied on September 17, 2008. Pursuant to United States Code, 28 U.S.C. § 1254, this Court has jurisdiction over such circuit court cases if it grants a Petition for Writ of Certiorari. Thus, this Court has jurisdiction to consider the current petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Immigration and Nationality Act [INA] § 212(c) [8 U.S.C. § 1182(c)](1995)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of

subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Antiterrorism and Effective Death Penalty Act [AEDPA] § 440(d)

Section (c) of such Act (8 U.S.C. § 1182(c)) is amended –

(1) by striking "The first sentence of this" and inserting "Thus;" and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).".

Illegal Immigration Reform and Immigrant Responsibility Act [IIRIRA] § 304(b)

Section 212(c) (8 U.S.C. § 1182(c)) is repealed.

Illegal Immigration Reform and Immigrant Responsibility Act [IIRIRA] § 321(a)(3)

(a) IN GENERAL – Section 101(a)(43) (8 U.S.C. § 11010(a)(43)), as amended by section 441(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132), is amended –

* * *

(3) in subparagraphs (F), (G), (N), and (P), by striking "is at least 5 years" each place it appears and inserting "at least one year";

STATEMENT OF THE CASE

A. Preliminary Case Facts

On March 10, 1997, Petitioner pled nolo contendere to grand theft embezzlement by an employee, in violation of California Penal Code §§ 424/487(b)(3). Although she was originally sentenced to probation in April 1998, her probation was revoked and she received a final sentence of three years for the offense.

Before Petitioner pled guilty, on April 24, 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA"); that Act rendered those deemed to be aggravated felons ineligible for relief under INA § 212(c) [8 U.S.C. § 1182(c)] (hereinafter § 212(c)), as well as other criminal aliens whose convictions are not relevant here.

On September 30, 1996, Congress also passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"); that Act added additional crimes to the aggravated felony definition and amended some aggravated felony terms already in existence. Among other changes, IIRIRA changed the prison term required for a theft aggravated felony from five years to one year. It also eliminated INA § 212(c) relief generally. IIRIRA, while passed before Petitioner pled guilty, did not take effect until April 30, 1997.

B. Administrative Proceedings

In May 1998, Petitioner was issued a Notice to Appear, and placed in removal proceedings. She was charged with being removable from the United States under INA § 237(a)(2)(A)(iii) [8 U.S.C. § 1227(a)(2)(A)(iii)], for having been convicted of an aggravated felony. Upon issuance of the Notice to Appear, Petitioner was taken into custody by U.S. Immigration and Naturalization Service (now U.S. Immigration and Customs Enforcement).

During proceedings, Petitioner argued that she was eligible for relief from removal under INA § 240A(a) [8 U.S.C. § 1229b], cancellation of removal for permanent residents, and under former INA § 212(c) as it existed before its elimination. On May 20, 1999, the Immigration Judge pretermitted all forms of relief. [App. at 33; App. at 45-47.] She found that Petitioner was an aggravated felon and not

eligible for relief under the current statute, INA § 240A(a). She also determined that, because the Petitioner was in removal proceedings, she could not seek relief under former INA § 212(c). [Id.]

On June 18, 1999, Petitioner appealed the Immigration Judge's decision to the Board of Immigration Appeals. That appeal was dismissed by the Board on October 25, 1999. [App. at 28-30.] After dismissal by the Board, Petitioner also petitioned for review from the Ninth Circuit Court of Appeals; that Petition for Review was dismissed for lack of jurisdiction on April 21, 2000.

C. District Court/Petition for Writ of Habeas Corpus

In June 2000, Petitioner filed a Petition for Writ of Habeas Corpus in the U.S. District Court for the Northern District of California on the basis that she was being held in custody and subjected to mandatory and continued detention without bond by the Immigration and Naturalization Service in violation of the law; the action was filed under 28 U.S.C. § 2241.

On June 26, 2000, after the denial of her case by the Ninth Circuit Court of Appeals, Petitioner also filed a Petition for Emergency Stay of her removal from the United States before the District Court in connection with her previous Petition for Writ of Habeas Corpus.

On September 11, 2000, the U.S. District Court issued an order staying removal of Ms. Agasino. Subsequently, the Respondents' attorneys (the government) attempted to lift the stay because of intervening case law. During the government's attempts to lift the stay, Ms. Agasino raised the argument that she is eligible for relief under § 212(c) and that her removal must be stayed so that she can renew her application for relief before the Immigration Court, based on this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). Through supplemental briefing, she argued that the elimination of INA § 212(c) was impermissibly retroactive as to her.

On February 9, 2004, the U.S. District Court requested further briefing to determine whether it should lift the stay in Petitioner's case.

On April 16, 2004, the U.S. District Court lifted the stay of Petitioner's removal from the United States. The District Court determined that Petitioner could not have settled expectations in the availability of § 212(c) relief based on the Ninth Circuit Court of Appeals' ruling in *U.S. v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002). [App. at 10-28.]

D. Ninth Circuit Appeal

On May 4, 2004, Petitioner filed a Notice of Appeal to the Ninth Circuit Court of Appeals and Request for a Certificate of Appealability. That request was granted by the District Court on May 13, 2004. The Ninth Circuit Court of Appeals accepted

jurisdiction over the case under 28 U.S.C. § 1291, which allows for jurisdiction in the circuit courts of appeals over all final decisions of the district courts.[1]

During proceedings before the Ninth Circuit Court of Appeals, Petitioner continued to argue that she should be permitted to seek relief under INA § 212(c) and that the elimination of that relief was impermissibly retroactive as to her.

On April 11, 2005, the Ninth Circuit Court of Appeals set Oral Argument in Petitioner's case. On the same day, the Ninth Circuit heard Oral Argument in *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005) (overruled on jurisdictional grounds) (hereinafter "*Cordes v. Gonzales*").

---

[1] In 2005, while Ms. Agasino's Petition was pending at the Ninth Circuit, the REAL ID Act [Pub. L. No. 109-13 (5/11/2005)] was passed. Under that Act, the Circuit Courts of Appeals were given exclusive jurisdiction over judicial review of a removal order. Judicial review was foreclosed in all other courts, even under 28 U.S.C. § 2241. Under Section 106(c) of that provision, any case that was pending at the District Court level on the date of enactment was to be immediately transferred to the Circuit Court of Appeals with jurisdiction over the case and treated as a Petition for Review filed under INA § 242 [8 U.S.C. § 1252]. Based on this provision, the Circuit Courts of Appeals treated any appeal from the District Court, filed before the enactment of the REAL ID Act, as a Petition for Review as well. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005). Thus, the appeal of this decision before the Ninth Circuit was treated as a Petition for Review filed under INA § 242 [8 U.S.C. § 1252] 8 U.S.C. § 1252.

At Ms. Agasino's Oral Argument, the Ninth Circuit panel raised the issue of whether it violated Equal Protection under the Due Process Clause of the Fifth Amendment for Petitioner to be precluded from seeking INA § 212(c) relief. Petitioner argued that it did.

On August 16, 2005, the Ninth Circuit Court of Appeals issued a decision granting Petitioner's appeal based on the Court's reasoning in *Cordes*. [App. at 7-9.] In *Cordes*, the Ninth Circuit determined that it violated Equal Protection under the due process clause of the Fifth Amendment to preclude individuals who were not deportable at the time of their plea of guilty, but who became deportable later, from seeking § 212(c) relief while permitting those who were deportable at the time of their plea to obtain relief.

When Ms. Agasino's appeal was granted, the Appellees (Respondents in this case) requested the case be reheard by the Ninth Circuit Court of Appeals. Within that time, on February 25, 2008, *Cordes* was reheard and vacated on jurisdictional grounds, *see Cordes v. Mukasey*, 517 F.3d 1094 (9th Cir. 2008).

On May 5, 2008, the Ninth Circuit granted the Appellee's petition for rehearing and issued a new decision in the case, denying Petitioner's appeal. [App. at 50; App. at 1-6.] In its majority decision, the Ninth Circuit Court of Appeals addressed only Petitioner's original arguments, that the retroactive application of the aggravated felony definition violates due process of law and that the repeal of § 212(c) is impermissibly retroactive. The Ninth

Circuit found no merit in these arguments. It did not address whether elimination of § 212(c) relief violated Equal Protection as it had originally decided. [App. at 1-3.] In his dissenting opinion, Judge Ferguson found that it violates Equal Protection under the Due Process Clause to preclude Ms. Agasino from applying for relief under § 212(c). [App. at 3-6.]

On July 21, 2008, Petitioner filed a Petition for Rehearing and, alternatively, a Request for her case to be Reheard *En Banc*. In that Petition, she argued that the Ninth Circuit Court of Appeals erred when it did not consider Equal Protection arguments and did not find that it violated Equal Protection to preclude her from seeking § 212(c) relief.

On September 17, 2008, the Ninth Circuit Court of Appeals issued an Order in which it found that it would not rehear Petitioner's case. [App. at 51.]

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because the Ninth Circuit's Decision to Overturn the Previous Holding it Made in Petitioner's Case Violates Due Process and Is Contrary to the Accepted Course of Judicial Proceedings.

The Ninth Circuit originally granted Ms. Agasino's appeal because it determined that she was denied Equal Protection under the due process clause in the Fifth Amendment to the Constitution. It made this finding because it determined that an irrational distinction was drawn between those who could seek

§ 212(c) relief and those who could not, through citation of its decision in *Cordes v. Gonzales*. At that time, individuals were eligible for § 212(c) relief because they were deportable at the time of their plea as a result of an aggravated felony conviction or because of multiple convictions. However, those with a single and/or less serious conviction that did not render them deportable when they pled guilty (but that did render them deportable when the aggravated felony definition was expanded), could not seek relief. This distinction is not rational, and in granting Ms. Agasino's appeal, the Ninth Circuit determined that it could not form the basis for determining who is eligible for § 212(c) relief.

On May 5, 2008, the Ninth Circuit Court of Appeals granted a Petition for Rehearing filed by the Appellees in Ms. Agasino's case and issued a new decision in which it overturned its previous finding and denied her case. In making this decision, the Ninth Circuit Court of Appeals did not discuss the Equal Protection findings it had made before, which formed the basis for the grant of Ms. Agasino's case on August 16, 2005. In failing to address this issue and in failing to demonstrate any basis for abandoning its previous findings as to that issue, the Ninth Circuit Court of Appeals violated due process of law.

The Supreme Court determined some time ago that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming with traditional standards of fairness encompassed in due process of law." *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953). This

requirement necessitates, among other things, that appellate proceedings be fairly adjudicated.

The Ninth Circuit Court of Appeals, within whose circuit this case arose, has itself found that due process must be accorded in an immigration case and on appeal. In *Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000), it determined that while "there is no administrative rule requiring [an appellate body] to review all relevant evidence submitted on appeal. It is beyond argument, however, that the Due Process Clause requirement of a 'full and fair hearing' mandates that [the appellate body] do so in its capacity as a reviewing tribunal." (citations omitted).

While recognizing the need for a full hearing on appeal in *Larita-Martinez*, the Ninth Circuit Court of Appeals did not address all legal arguments before it when rehearing Ms. Agasino's case and issuing its denial. When it denied her case on May 5, 2008, it did not address those Equal Protection arguments raised during Ms. Agasino's Oral Argument, which arguments had formed the basis for the very decision it was rehearing.

Furthermore, while the Ninth Circuit's decision in *Cordes v. Gonzales* was overturned on jurisdictional grounds before Ms. Agasino's case was reheard in May 2008, it was the Equal Protection analysis and not the jurisdictional issue from *Cordes v. Gonzales* that formed the basis for the Ninth Circuit's decision in Ms. Agasino's case. The Ninth Circuit

never addressed its previous holding respecting Equal Protection when rehearing Ms. Agasino's case.

The Ninth Circuit Court of Appeals gave no reason for overturning its previous findings respecting Equal Protection, which had been made in Ms. Agasino's case when it granted her appeal. Instead, it discussed only Ms. Agasino's retroactivity arguments and those due process arguments related to the designation of her offense as an aggravated felony. In failing to give a basis for vacating its previous grant, the Ninth Circuit Court of Appeals departed from due process principles.

Ms. Agasino provided the Ninth Circuit Court of Appeals with the opportunity to remedy this due process violation by filing a Petition to Rehear the May 2008 decision. In her petition, Ms. Agasino raised the fact that the Ninth Circuit had failed to discuss the Equal Protection arguments that had formed the basis for its original decision and argued that Equal Protection warranted the grant of her appeal. The Ninth Circuit refused to rehear the case. The continued refusal of the Ninth Circuit to consider Equal Protection arguments in this case has precluded Ms. Agasino from obtaining review on an important aspect of her case. In fact, her case was originally granted because it was determined that she was being deprived of Equal Protection of the law. In failing to consider Equal Protection issues when rehearing her case, the Ninth Circuit prejudiced Ms. Agasino and violated her due process rights.

II. Review Is Warranted Because this Case Involves A Violation of Equal Protection Principles under the Due Process Clause of the U.S. Constitution and Involves an Important Question of Federal Law that Has Not Been Previously Decided by this Court.

This case raises an important question of federal law because it involves the application of constitutional, i.e. Equal Protection, principles. Ms. Agasino argues in this petition that she is being denied Equal Protection of the laws because she is precluded from seeking relief under § 212(c) based on the Ninth Circuit's decision in *U.S. v. Velasco-Medina*, 305 F.3d 839, 849 (9th Cir. 2002). Under that decision, the issue of whether to grant individuals in her position from seeking relief is resting solely on the fortuity of whether they were deportable at the time that they pled guilty, which is not a rational basis for drawing the distinction.

The Supreme Court has made it clear that Equal Protection, as part of the due process clause, must be applied to aliens within the confines of the United States. In *Wo v. Hopkins*, 118 U.S. 356, 369 (1886), an early case from this Court, it was held that due process provisions "are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

Subsequent decisions from this Court have found that while Congress has broad authority to pass laws

pertaining to aliens in the United States "of course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purposes." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

The circuit courts of appeals have, recognizing Supreme Court precedent, applied Equal Protection principles to issues regarding immigration law. In fact, the Ninth Circuit Court of Appeals, within whose circuit this case arises, recognized the "well established" rule that due process of law applies to all individuals in the United States, including aliens; it further held that Equal Protection applies to the same degree because it is incorporated into the due process clause. *See Garberding v. INS*, 30 F.3d 1187, 1190 (9th Cir. 1994). The Ninth Circuit Court of Appeals further held in that case that "federal classifications distinguishing among groups of aliens thus are valid unless 'wholly irrational.'" *Garberding*, 30 F.3d at 1190 (quoting *Sudomir v. McMahon*, 767 F.2d 1456, 1464 (9th Cir. 1985)).

The Second Circuit Court of Appeals analyzed Equal Protection as it applies to lawful permanent resident aliens within the United States. It held that "[f]undamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner." *Francis v. INS*, 532 F.2d 268, 273 (2nd Cir. 1976). The *Francis* decision was applied by the Board of Immigration Appeals in *In re Silva*, 16 I. & N. Dec. 26, 30 (BIA 1976) and was recognized by this Court in

INS v. St. Cyr, 533 U.S. 289, 295 (2001). In addition, the *Francis* Equal Protection analysis has been applied by a majority (if not all) of the circuit courts of appeals, including the Ninth Circuit. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 914 (9th Cir. 2004).

Individuals, like Ms. Agasino, who pled guilty to convictions that did not render them deportable at the time of conviction, but who later became deportable when their convictions were reclassified as aggravated felonies by IIRIRA, were found in *U.S. v. Velasco-Medina*, 305 F.3d 839, 849 (9th Cir. 2002), to be ineligible for 212(c) relief. The Ninth Circuit Court of Appeals determined that these individuals were not eligible for discretionary relief because they were never deportable, thus they could not have settled expectations in § 212(c) relief. Furthermore, at the time of their convictions, AEDPA § 440(d) made it clear that if their convictions were reclassified to be aggravated felonies, they would be ineligible for relief. On these grounds the Ninth Circuit determined that the elimination of § 212(c) relief did not have an impermissibly retroactive effect as to these individuals.

While individuals in Ms. Agasino's position (and that of *Valesco-Medina*) have been found to not have settled expectations in § 212(c) relief, it violates due process of law to preclude them from seeking that form of relief. These people are being treated disparately from individuals who were deportable at the time of their plea of guilty.

The difference in treatment that stems from the Ninth Circuit's decision in *Velasco-Medina* violates Equal Protection principles because it is not rationally related to a legitimate government purpose. As the Ninth Circuit Court of Appeals recognized in *Cordes*, prior to it being overturned on jurisdictional grounds:

> Allowing permanent residents who have committed worse crimes than Cordes to apply for section 212(c) relief, while denying the same opportunity to Cordes, does not achieve Congress' express purpose behind the expanded definition of aggravated felony and its retroactive application: to expeditiously remove criminal aliens and make it more difficult for them to obtain relief from removal. Indeed, the disparate grant of section 212(c) relief here does not increase the total number of criminal aliens subject to removal, as Congress intended, but rather perversely increases only the number of less dangerous criminals subject to removal.

Cordes v. Gonzales, 421 F.3d at 898 (overruled on other grounds).

The distinction between those who can seek § 212(c) relief and those who cannot, which is at issue in Ms. Agasino's case is based solely on the fortuity of whether someone was deportable at the time of his or her conviction or was rendered deportable later when the aggravated felony definition was changed. Strangely, this distinction works irrationally to permit more serious criminals who were deportable at the time of their conviction because they were

previously convicted of other offenses or were convicted of some sort of serious offense, like drug trafficking, to seek 212(c) relief, but precluding those who were not deportable at the time of their conviction from seeking that form of relief. This distinction does not make sense and so cannot conform to Equal Protection principles that are part of the due process clause of the Constitution.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests that the Supreme Court grant her Petition for Writ of Certiorari because the Ninth Circuit Court of Appeals violated standards respecting the appropriate administration of judicial proceedings and because the case involves a significant federal question that has yet to be decided by this Court.

DATED: December 16, 2008

Respectfully submitted,

ROBERT L. REEVES
REEVES & ASSOCIATES,
A PROFESSIONAL LAW CORP.
2 North Lake Ave., Ste. 940
Pasadena, CA 91101

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA SOCORRO AGASINO, Petitioner-Appellant, v. COUNTY OF SANTA CLARA; et al., Respondents-Appellees.	No. 04-16038 D.C. No. CV-00-02253-VRW MEMORANDUM* (Filed May 5, 2008)

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted April 11, 2005
San Francisco, California

Before: FERGUSON, NOONAN, and RYMER, Circuit Judges.

Maria Socorro Agasino, a native of the Philippines, appeals the district court's judgment denying her habeas corpus petition pursuant to 28 U.S.C. § 2241. We construe her habeas petition as if it were a timely-filed petition for review with this court. *Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005). So construed, we deny the petition.

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Agasino challenges her removal on the footing that retroactive application of IIRIRA's[1] aggravated felony definition violates due process, and that IIRIRA's repeal of the discretionary relief from deportation previously available under INA § 212(c) is impermissibly retroactive when applied to crimes committed before the Act's effective date. She cites no relevant authority for the first proposition. In any event, it runs counter to long-standing recognition that Congress has power to legislate retroactively with respect to laws regarding deportation and discretionary relief from deportation. *See, e.g., Galvan v. Press*, 347 U.S. 522, 529-32 (1954); *see also Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1108-09 (9th Cir. 2003); *Aragon-Ayon v. INS*, 206 F.3d 847, 853 (9th Cir. 2000); *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999); *United States v. Yacoubian*, 24 F.3d 1, 8 (9th Cir. 1994). Her second argument is foreclosed by *United States v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002).

PETITION DENIED.

---

[1] The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. Law No. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996).

Agasino v. County of Santa Clara, No. 04-16038

FERGUSON, Circuit Judge, dissenting:

I dissent because I believe that we reached the correct result in our initial disposition of this case, which the majority withdraws today. *Agasino v. County of Santa Clara*, No. 04-16038, 2008 WL ___. In our initial decision, we granted Agasino's petition for review based on the equal protection rationale that served as the foundation of our grant of relief in *Cordes v. Gonzales*, 421 F.3d 889 (9th Cir. 2005). *Agasino v. Chertoff*, No. 04-16038, 2005 WL 2033330 (9th Cir. Aug. 24, 2005). *Cordes* was subsequently vacated on jurisdictional grounds, *see Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008), and the majority here chooses to abandon its reasoning. I continue to believe that denying Agasino the opportunity to apply for relief from removal while allowing similarly situated individuals that opportunity violates her equal protection rights. Accordingly, I would grant her petition for review.

Agasino, a native of the Phillippines, has been a lawful permanent resident ("LPR") of the United States since 1970. She entered a nolo contendere plea to grand theft embezzlement on March 10, 1997. At the time of her plea her crime was not considered an aggravated felony, and did not render her deportable.

Agasino entered her plea during the period between the effective dates of AEDPA[1] and IIRIRA. Section 440(d) of AEDPA made LPRs who commit aggravated felonies ineligible for discretionary relief from removal under INA § 212(c). This change in itself had no effect on Agasino, as her crime was not an aggravated felony. Shortly after her plea, however, her crime was retroactively reclassified as an aggravated felony by IIRIRA, which took effect on April 1, 1997. *See* 8 U.S.C. § 1101(a)(43)(G). IIRIRA also replaced § 212(c) relief with cancellation of removal, a more restrictive form of relief unavailable to people with convictions for aggravated felonies. *See* 8 U.S.C. § 1229b(a)(3). With these changes in the law, Agasino was rendered both deportable and ineligible for relief, whereas at the time of her plea she had been neither.

In *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), the Supreme Court held that AEDPA's repeal of § 212(c) could not be retroactively applied to noncitizens who pled guilty to deportable offenses before the passage of AEDPA and were eligible at the time of their pleas for § 212(c) relief. *Id.* at 293. The Court held that applying the repeal of § 212(c) retroactively in such cases would be "contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 323-24. In *United States v. Velasco-Medina*, this Court determined that *St. Cyr*'s holding

---

[1] The Antiterrorism and Effective Death Penalty Act, Pub.L. No. 104-32, 110 Stat. 1214 (April 24, 1996).

was inapplicable to LPRs like Agasino, who pled guilty to nondeportable offenses after AEDPA but before IIRIRA, and whose crime IIRIRA retroactively transformed into a deportable offense. 305 F.3d 839, 850 (9th Cir. 2002).

The combined effect of *St. Cyr* and *Velasco-Medina* produces a bizarre result. Had Agasino pled guilty to a crime that rendered her deportable at the time of her plea – one that was more severe, or that followed a prior conviction – she would have been eligible for § 212(c) relief under *St. Cyr*. Instead, because her crime was considered too minor at the time of her plea to carry any immigration consequences, she is ineligible for relief from removal today. LPRs with more serious or extensive criminal records, on the other hand, are able to apply for § 212(c) relief.

It is "wholly irrational" and a violation of the guarantee of equal protection to extend § 212(c) relief to LPRs who pled to deportable offenses but to withhold it from LPRs, like Agasino, who did not. *See Mathews v. Diaz*, 426 U.S. 67, 83 (1976). These two groups of LPRs facing deportation are similarly situated. The only difference between them is that one group pled to crimes that rendered them deportable at the time of the plea, while the other group became deportable retroactively. This distinction, however, is "irrelevant and fortuitous," as both are now subject to removal. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent resident aliens who are in like

circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

This Court's case law requires that similarly situated LPRs receive similar treatment under § 212(c). *See Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1198 (9th Cir. 2002); *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981). There is no rational basis for denying § 212(c) relief to noncitizens who pled guilty to crimes that carried no immigration consequences, while making relief available to those noncitizens who committed more, or worse, crimes.

Finally, I note that Congress's aim in expanding the definition of aggravated felony and making that expansion retroactive was to increase the rate of removal of noncitizens who commit crimes, and reduce the availability of relief from removal. *See* H.R. Rep. No. 104-879, at 107-09 (1997). The combined effect of *St. Cyr* and *Velasco-Medina* is to increase only the number of *less dangerous* noncitizens subject to removal, while permitting more dangerous noncitizens to apply for relief.

Rather than upholding an irrational classification, as the majority does, I would grant Agasino's petition for review. Accordingly, I dissent.

2005 U.S. App. LEXIS 17569

MARIA SOCORRO AGASINO,
Petitioner-Appellant, v. MICHAEL CHERTOFF,*
Secretary of the Department of Homeland Security,
Respondent-Appellee.

No. 04-16038

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

April 11, 2005, Argued and Submitted,
San Francisco, California August 16, 2005, Filed

SUBSEQUENT HISTORY: Opinion withdrawn by *Agasino v. Chertoff,* 2005 U.S. App. LEXIS 18132 (9th Cir. Cal., Aug. 24, 2005)

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of California. D.C. No. CV-00-02253-VRW. Vaughn R. Walker, District Judge, Presiding.

COUNSEL: For MARIA SOCORRO AGASINO, Petitioner-Appellant: Nancy E. Miller, Esq., ROBERT L. REEVES & ASSOCIATES, Pasadena, CA; Philippe Dwelshauvers, Fresno, CA.

---

* Michael Chertoff, Secretary of the Department of Homeland Security, is substituted for Charles H. DeMore. Fed. R. App. P. 43(c)(2).

For COUNTY OF SANTA CLARA, CHARLES H. DEMORE, DISTRICT DIRECTOR, JOCELYN BURTON, STATE OF CALIFORNIA, Respondent-Appellees: Jocelyn Burton, Esq., USSF – OFFICE OF THE U.S. ATTORNEY, San Francisco, CA.

JUDGES: Before: FERGUSON, NOONAN, and RYMER, Circuit Judges.

OPINION

MEMORANDUM

Maria Socorro Agasino, a native of the Philippines, appeals the District Court's denial of her 28 U.S.C. § 2241 habeas petition challenging the constitutionality of her final order of removal. Agasino pleaded nolo contendere to grand theft embezzlement.

On appeal, Agasino contends that the District Court erred when it (1) applied retroactively the amended aggravated felony definition under section 321 of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRJRA"), Pub L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) and (2) rejected her due process challenge to the retroactive application of the amended aggravated felony definition.

Because Agasino's case is materially indistinguishable from the petitioner's in *Cordes v. Gonzales*, ___ F.3d ___, 2005 U.S. App. LEXIS 16716, No. 04-15988

(9th Cir. August ___, 2005), we remand for reconsideration consistent with that opinion.

REMANDED.

RYMER, Circuit Judge, dissenting:

I dissent for the same reasons that I dissented in *Cordes v. Gonzales*, ___ F.3d ___, 2005 U.S. App. LEXIS 16716, No. 04-15988 (9th Cir. Aug. ___, 2005) – and for the additional reason that Agasino does not raise an equal protection challenge on appeal. Otherwise, the issues she does raise lack merit. Accordingly, I would affirm.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIA SOCORRO AGASINO,
Petitioner,
v
STATE OF CALIFORNIA, COUNTY OF SANTA CLARA, SUPERIOR COURT et al,
Respondents.
/

No C 00-2253 VRW
ORDER
(Filed Apr. 16, 2004)

On September 11, 2000, the court issued a stay of execution of petitioner's removal. Doc # 21. On February 9, 2004, court requested further briefing to determine whether to lift the current stay. Doc # 36. According to the analysis below, the court LIFTS its stay of September 11, 2000. Doc # 21.

I

A

Petitioner became a legal permanent resident of the United States in 1970. Petitioner was arrested for grand theft embezzlement on August 8, 1995. Petitioner pled no contest to grand theft embezzlement on March 10, 1997, and was sentenced to more than one year but less than five years in state prison. Removal proceedings were brought against petitioner on May 6, 1998, and petitioner was, thereafter, found removable. On September 11, 2000,

the court issued a stay of execution of petitioner's removal.

The basis for the court's original stay has been discussed in detail in other locations and will only be summarized here. See Order (Doc # 36). The court issued its stay on September 11, 2000, on the basis of an Equal Protection Clause claim, which was being considered at the time by the Ninth Circuit. Because the Ninth Circuit ruled in a manner that eliminated the basis for petitioner's Equal Protection Clause claim, the court stated recently that "[p]etitioner can no longer rely on her equal protection argument." Id at 6.

Petitioner now argues that the court should not lift the current stay because petitioner should be allowed additional time to apply for a waiver from removal, which was previously called deportation, under former section 212(c) of the Immigration and Naturalization Act ("INA"). Pet Br (Doc # 39). The basis of petitioner's argument is that the elimination of petitioner's eligibility for a discretionary removal waiver is impermissibly retroactive. The two statutes that eliminate petitioner's eligibility for a discretionary removal waiver are the Antiterrorism and Effective Death Penalty Act ("AEDPA") and The Illegal Immigration and Immigrant Responsibility Act ("IIRIRA"), AEDPA, Pub L No 104-132, 110 Stat 1214; IIRIRA, Pub L No 104-208, 110 Stat 3009-546.

B

At the time petitioner committed her criminal conduct, petitioner's crime did not make her deportable because her sentence was not sufficiently long to make her crime an aggravated felony. See 8 USC § 1251(a)(2)(A)(iii) (1996), *now codified* at 8 USC § 1227(a)(2)(A)(iii). Further, INA section 212(c) authorized certain permanent resident aliens to apply to the Attorney General for a discretionary waiver from removal if the aliens had not been convicted of a crime for which the sentence was five years or greater. 8 USC § 1182(c) (1996), *recodified as modified at* 8 USC § 1229(b). Because petitioner had not been convicted of a crime for which the sentence was five years or greater, she would have been eligible for section 212(c) relief if she were otherwise deportable.

On April 24, 1996, AEDPA went into effect. AEDPA did not render petitioner deportable because it did not change the status of petitioner's crime to an aggravated felony. Nor did AEDPA eliminate petitioner's eligibility for section 212(c) relief if she were otherwise deportable. Instead, AEDPA merely effected a non-substantive change in the definition of eligibility for section 212(c) relief. Before AEDPA, for persons who committed a "theft offense," an aggravated felony was defined as a crime for which the person was sentenced to "at least 5 years." 8 USC § 1101(a)(43)(G) (1996). Likewise, ineligibility for a discretionary removal waiver was defined in terms of "an alien who has been convicted of one or more aggravated felonies and has served for such felony or

felonies a term of imprisonment of at least 5 years." 8 USC § 1182(c) (1996). AEDPA changed the definition of ineligibility for a discretionary removal waiver by tying it directly to the definition of aggravated felony. AEDPA § 440(d) (substituting "1251(a)(2)(A)(iii)," the code section defining aggravated felony at the time, for the language quoted above). Accordingly, this change had no substantive effect on the eligibility of persons in petitioner's position for section 212(c) relief.

IIRIRA was passed on September 30, 1996, and took effect on April 1, 1997. See Pub L No 104-208, 100 Stat 3009-546. IIRIRA changed the definition of aggravated felony to include petitioner's crime. IIRIRA § 321, *as codified in* 8 USC § 1101(a)(43)(G) (broadening the definition of aggravated felony to include a "theft offense * * * or burglary offense for which the term of imprisonment [sic] at least one year"). This effected two major changes to petitioner's status in the United States. First, IIRIRA made petitioner deportable because persons convicted of aggravated felonies are deportable. See 8 USC § 1227(a)(2)(A)(iii) (providing that persons convicted of aggravated felonies are deportable).

Second, the change in status of petitioner's crime to aggravated felony eliminated her eligibility for a discretionary removal waiver because AEDPA had tied the eligibility for such waivers to the definition of aggravated felony. IIRIRA section 302 further modified the discretionary removal waiver provision by relabeling it as "cancellation of removal" and transferring it to a different section of the United States Code. See IIRIRA § 304(b), *as codified in* 8

USC § 1229b. This change in name and location, however, did not make any substantive changes for aliens in petitioner's position.

For ease of reference throughout this order, the court refers to relief available before IIRIRA as section 212(c) relief and refers to relief available after IIRIRA as cancellation of removal. If referring generally to either section 212(c) relief or cancellation of removal, the court uses the term discretionary removal waiver. Further, the court uses the term "removal" throughout the order, even though deportation was used prior to IIRIRA. Finally, the court uses the term "deportable" because it appears that this term is still used in the Code. See, e g, 8 USC § 1227(a)(2)(A)(iii).

II

A

The court first considers whether IIRIRA had an impermissible retroactive effect on petitioner based on the date of her plea of no contest. Three primary cases govern the court's analysis: *INS v St Cyr*, 533 US 289 (2001), *United States v Leon-Paz*, 340 F3d 1003 (9th Cir 2003) and *United States v Velasco-Medina*, 305 F3d 839 (9th Cir 2002), *cert denied*, *Velasco-Medina v United States*, 124 S Ct 1488 (2004). Because a retroactivity analysis necessarily turns on timing, the court provides the following timeline, Figure 1, detailing the relevant dates in this case and the aforementioned cases in reference to the effective dates of AEDPA and IIRIRA.

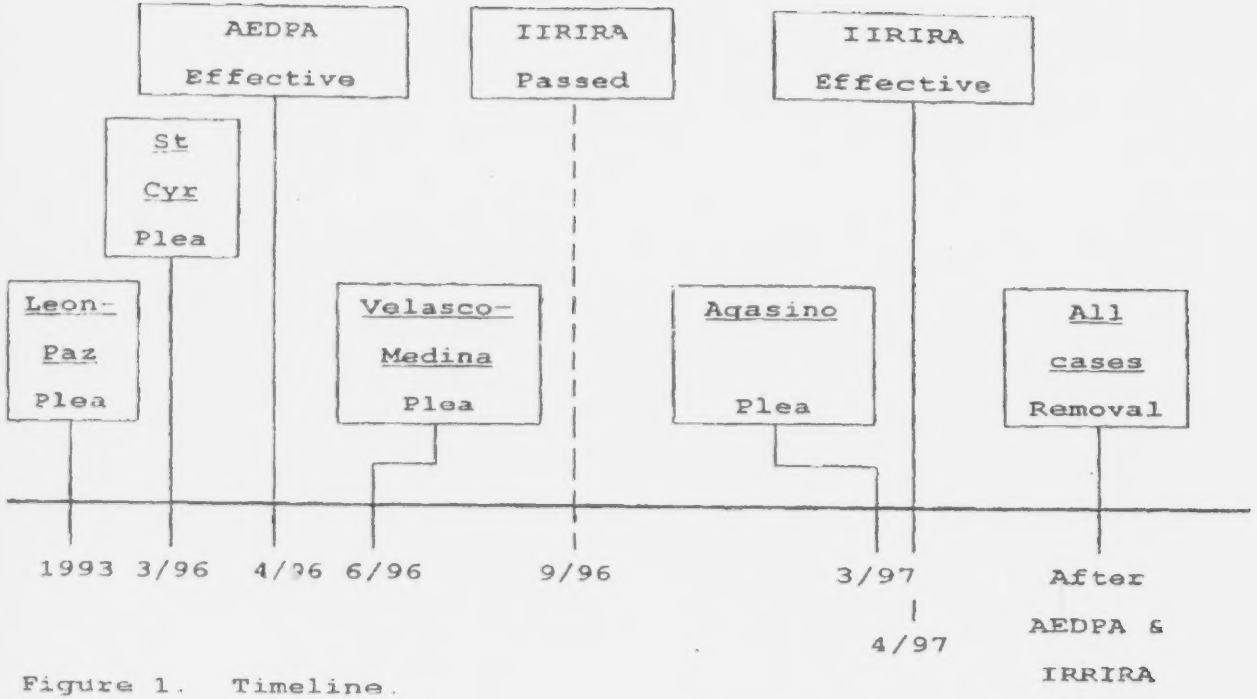

Figure 1. Timeline.

1

In *INS v St Cyr*, the Supreme Court considered whether the application of AEDPA and IIRIRA to eliminate eligibility for section 212(c) relief for aliens who pled guilty prior to the enactment of these laws imposed an impermissible retroactive effect. 533 US 289 (2001). Before AEDPA and IIRIRA became effective, St Cyr was a legal permanent resident who pled guilty to a charge of selling a controlled substance. Id at 293. At the time of his plea and conviction, St Cyr was deportable but eligible for a discretionary removal waiver under section 212(c). Id at 314. After AEDPA and IIRIRA became effective, St Cyr was no longer eligible for section 212(c) relief. Because removal proceedings were instituted against St Cyr after AEDPA and IIRIRA became effective, it was argued the Attorney General no longer possessed the discretion to grant removal waivers. Id.

The Supreme Court applied the *Landgraf v USI Film Products*, 511 US 244 (1994), two-prong test to determine whether AEDPA and IIRIRA had an impermissible retroactive effect as applied to St Cyr. *St Cyr*, 533 US at 316-326. The first step of the *Landgraf* test "is to ascertain whether Congress has directed with the requisite clarity that the law can be applied retrospectively." Id at 316. The Court determined that Congress did not speak with the requisite clarity in enacting AEDPA and IIRIRA to permit retroactive exclusion from section 212(c) relief. Id at 320.

Under the second step, the Court considered whether applying AEDPA and IIRIRA to the facts of the case would have an "impermissible retroactive effect." Id at 320-24. A statute has an impermissible retroactive effect when "it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Landgraf*, 511 US at 269.

The Court held that depriving St Cyr of eligibility for a section 212(c) waiver would have an impermissible retroactive effect. *St Cyr*, 533 US at 323-24. The Court reasoned that St Cyr entered into the plea agreement with the expectation that he would be eligible to apply for section 212(c) relief. Id at 321-24. Because plea agreements involve a quid pro quo between a criminal defendant and the government, it would have disrupted St Cyr's settled expectations to hold that AEDPA and IIRIRA deprive St Cyr, of eligibility to apply for section 212(c) relief. Id at 321-24. Accordingly, under *St Cyr*, aliens who pled guilty to crimes before the effective dates of AEDPA and IIRIRA retain their eligibility, if any, for section 212(c) relief. Id at 325.

Petitioner's case is distinguishable from *St Cyr* in two significant ways. First, in *St Cyr*, St Cyr pled guilty to an aggravated felony before the effective date of AEDPA and IIRIRA. In this case, petitioner pled guilty after AEDPA's effective date and just three weeks before IIRIRA's effective date. Second; when St Cyr pled guilty, he was deportable but

eligible for a discretionary waiver. In this case, petitioner was not deportable at the time of her plea and conviction.

2

United States v Leon-Paz is more analogous to the present case than *St Cyr* because the *Leon-Paz* court addressed the availability of section 212(c) discretionary relief for an alien who was not deportable at the time of his plea. 340 F3d 1003 (9th Cir 2003). Leon-Paz pled guilty to burglary and was sentenced to more than one year and less than five years in prison. Id at 1004. The plea occurred prior to both AEDPA and IIRIRA. Id at 1005. At the time of his plea, Leon-Paz was not deportable. Id. When IIRIRA became effective, Leon-Paz became deportable and, at the same time, ineligible for a discretionary removal waiver under the cancellation of removal provisions. Thereafter, removal proceedings were brought against Leon-Paz. Id at 1004.

The Ninth Circuit held that Leon-Paz was eligible for section 212(c) relief, relying heavily on the Supreme Court's decision in *St Cyr*. Id at 1006. The *Leon-Paz* court focused its analysis on Leon-Paz having "two bulwarks to protect himself against attacks on his residence in this country:" (1) Leon-Paz was not deportable at the time of his plea and conviction and (2) he would otherwise have been eligible for a discretionary removal waiver. Id. Under the first prong of the *Landgraf* analysis, the Ninth Circuit

found that Congress had expressed a clear intent to pull down the first "bulwark," Leon-Paz's deportability, but that Congress had not expressed a clear intent to pull down the second "bulwark," Leon-Paz's eligibility for a discretionary removal waiver. Under the second prong of the *Landgraf* analysis, the Ninth Circuit concluded that the availability of section 212(c) relief at the time of Leon-Paz's plea created a settled expectation.

Petitioner's case is distinguishable from *Leon-Paz* in one significant respect. In *Leon-Paz*, the plea occurred before AEDPA and IIRIRA. In this case, petitioner's plea and conviction occurred after AEDPA and shortly before IIRIRA.

3

United States v Velasco-Medina is directly analogous to petitioner's case. The Ninth Circuit held in *Velasco-Medina* that section 212(c) eligibility is not available for an alien whose plea and conviction occurred after AEDPA but prior to IIRIRA. 305 F3d at 850. Because *Velasco-Medina* is directly applicable to petitioner's case, the court is bound to follow its holding and concludes, therefore, that petitioner is not entitled to section 212(c) relief.

Velasco-Medina pled guilty to theft and received a prison sentence of more than one year but less than five years. Id at 843. His plea occurred after AEDPA but prior to IIRIRA. Id. At the time of Velasco-Medina's plea, he was not deportable because his

crime was not classified as an aggravated felony. Velasco-Medina became deportable and ineligible for a discretionary removal waiver when IIRIRA became effective. Removal proceedings were instituted, thereafter, against Velasco-Medina.

The Ninth Circuit applied the two-part *Landgraf* analysis as the *St Cyr* and *Leon-Paz* courts had done. Under the first prong, the Ninth Circuit assumed that the Supreme Court's holding as to the first prong in *St Cyr* applied to the facts in *Velasco-Medina*. As described above, the Supreme Court held in *St Cyr* that Congress did not speak with sufficient clarity to apply retroactively the elimination of section 212(c) relief for St Cyr.

Under the second prong of the *Landgraf* analysis, the Ninth Circuit first reasoned that Velasco-Medina did not enjoy "vested right[]" in section 212(c) relief because he was not deportable before IIRIRA was passed. *Velasco-Medina*, 305 F3d at 849. The Ninth Circuit also reasoned that the changes rendered by AEDPA created a "legal landscape" that must have shaped Velasco-Medina's settled expectations as follows:

> AEDPA provided Velasco-Medina with fair notice that discretionary relief under § 212(c) would be unavailable in the event his conviction was reclassified as an aggravated felony. To the extent he anticipated the continued availability of § 212(c) relief after his guilty

> plea, his expectations were neither reasonable nor settled under *St Cyr*.

Id at 850.

Velasco-Medina is directly analogous to petitioner's case because the material facts are indistinguishable. In both cases, the aliens pled guilty after AEDPA but prior to IIRIRA. Both aliens pled guilty to crimes that were neither aggravated felonies nor deportable offenses under then-current law. Finally, both aliens became deportable and ineligible for a discretionary removal waiver at the same time due to the changes in IIRIRA. Indeed, petitioner's case is even weaker than Velasco-Medina's, because petitioner pled guilty after IIRIRA was passed, whereas Velasco-Medina pled guilty before IIRIRA was passed.

4.

The court notes a potential problem in the reasoning of *Leon-Paz* and *Velasco-Medina*. The Ninth Circuit, in both *Leon-Paz* and *Velasco-Medina*, merely assumed, based on *St Cyr*, that Congress did not speak with the requisite clarity under the first step of the *Landgraf* analysis. Id at 848-49; *Leon-Paz*, 340 F3d at 1006. Unlike this case, St Cyr's ineligibility for section 212(c) relief was unrelated to IIRIRA section 321, which the Supreme Court described in the following terms: "IIRIRA's amendment of the definition of 'aggravated felony,' for example, *clearly states* that it applies with respect to 'conviction[s] * * *

entered before, on, or after' the statute's enactment date." *St Cyr*, 533 US at 319 (quoting IIRIRA § 321) (emphasis added).

The facts of *Velasco-Medina*, *Leon-Paz* and this case are substantially different from *St Cyr* in this regard. As noted above, AEDPA tied eligibility for a discretionary removal waiver to the definition of an aggravated felony. IIRIRA section 321 changed the definition of aggravated felony to include persons in Velasco-Medina's, Leon-Paz's and petitioner's position. It was the change in IIRIRA section 321, therefore, that eliminated eligibility for discretionary removal waivers. Courts have consistently held that Congress expressly directed that section 321 operates retroactively. See *St Cyr*, 533 US at 319 fn 3 (dictum); *Aragon-Ayon v INS*, 206 F3d 847, 851-53 (9th Cir 2000); see also *Chambers v Reno*, 307 F3d 284, 292 (4th Cir 2002). Accordingly, it would appear that Congress spoke with clarity about the retroactive effect of persons whose eligibility was eliminated indirectly through the change in the definition of aggravated felony. This suggests that the retroactivity analysis in *Leon-Paz* and *Velasco-Medina* should have ended at the first prong of the *Landgraf* test.

IV

The court now turns to petitioner's argument that AEDPA and IIRIRA have an impermissible retroactive effect in relation to the date on which petitioner committed her criminal acts, as compared

to the date of her plea and conviction. Petitioner contends that the court should extend *St Cyr* to apply to the date on which petitioner's criminal conduct occurred. Pet Br (Doc # 39).

The court declines to extend *St Cyr*. As noted above, *Velasco-Medina* considered *St Cyr* in detail and held that application of AEDPA and IIRIRA to an alien who pled guilty after the passage of AEDPA was not impermissibly retroactive because the alien did not have settled expectations in obtaining a discretionary removal waiver. *Velasco-Medina*, 305 F3d at 849-50. If the petitioner's expectations after careful consideration in a plea bargain are not settled, then it cannot reasonably be argued that aliens commit crimes in reliance on the possibility of being granted 212(c) relief. See *Khan v Ashcroft*, 352 F3d 521, 523 (2d Cir 2003) (stating that it would be unreasonable to suppose that an "alien might have been deterred from committing a crime had he known that, in addition to the prospect of imprisonment and removal following release, he could not ask for discretionary relief from deportation"); *Domond v INS*, 244 F3d 81, 85-86 (2d Cir 2001) (same).

Accordingly, the court concludes that the application of AEDPA and IIRIRA to petitioner's case is not impermissibly retroactive on petitioner, even though she committed her criminal conduct before AEDPA and IIRIRA became effective.

V

The court now considers petitioner's argument that the retroactive application of IIRIRA section 304 violates due process under *United States v Ubaldo-Figueroa*, 347 F3d 718 (9th Cir 2003), *amended and superseded by, United States v Ubaldo-Figueroa*, No 01-50376, 2003 WL 23355650, at *1 (9th Cir Apr 7, 2004). Pet Br (Doc # 39) at 4-5. Petitioner argues that because the court in *Ubaldo-Figueroa*, 347 F3d 718, found that the explicitly retroactive section 321 raises due process concerns, the non-explicitly retroactive section 304 must raise more serious due process concerns, and, accordingly, that she is eligible for discretionary relief. Pet Br (Doc # 39).

After submission of papers in this case, the Ninth Circuit amended and superseded the *Ubaldo-Figueroa* opinion. See *Ubaldo-Figueroa*, 2003 WL 2335560, at *1. The language relied upon by petitioner in her papers now is contained within a concurring opinion. See id at *7-*10 (Pregerson, J, concurring). For the reasons below, the court is not persuaded by petitioner's argument.

Ubaldo-Figueroa involved a legal permanent resident who pled guilty to attempted first degree burglary in 1993, and received a sentence of more than one year but less than five years. Id at *2. Ubaldo-Figueroa's crime was not a deportable offense. Id. In 1998, removal proceedings were instituted against Ubaldo-Figueroa because IIRIRA section 321 reclassified his conviction as an aggravated felony

and made him deportable. Id. At his removal hearing, the immigration judge stated that there was no relief from removal for which Ubaldo-Figueroa was eligible. Id. The Ninth Circuit concluded that Ubaldo-Figueroa was prejudiced by the immigration judge's decision because Ubaldo-Figueroa presented a plausible argument that he was eligible for section 212(c) relief under *United States v Leon-Paz*. Id at *5.

Petitioner's reliance on *Ubaldo-Figueroa* is problematic for several reasons. First, the due process analysis upon which petitioner relies has been moved to a concurring opinion in the superseding decision. See id at *7-*10. Second, the concurring opinion recognizes that the due process argument is only an alternative ground for Ubaldo-Figueroa's relief from deportation. See id at *6-*7. Third, the concurring opinion states that "the explicit retroactive application of IIRIRA § 321 *raises serious due process concerns*." Id at *8 (emphasis added). In other words, the concurring opinion did not conclude that Ubaldo-Figueroa's due process rights were violated but merely that Ubaldo-Figueroa had a colorable claim of a due process violation that he could have asserted on appeal.

Finally, *Ubaldo-Figueroa* is distinguishable on its (facts from petitioner's case. Ubaldo-Figueroa's conviction occurred in 1993, prior to both AEDPA and IIRIRA. In contrast, petitioner's conviction occurred between AEDPA and IIRIRA. The timing of these convictions is significant to the temporal limitations

prong of the concurring opinion's analysis. In *Ubaldo-Figueroa*, the concurring opinion states that section 321's absence of time limits "profoundly disrupts" the settled expectations of an alien who pled guilty prior to AEDPA and IIRIRA in two ways: (1) aliens who committed non-deportable crimes in the past established lives with the expectation that "they had borne the consequences of their prior criminal conduct" and (2) section 321 disrupts the expectations of aliens who pled guilty to crimes that did not render them deportable. Id at *10; see also *St Cyr*, 533 US at 322.

In petitioner's case, however, it cannot be said that she had similar settled expectations regarding the availability of section 212(c) relief when she pled guilty. Unlike in *Ubaldo-Figueroa* in which the alien's conviction pre-dated AEDPA and IIRIRA, petitioner's conviction occurred between AEDPA and IIRIRA. Ubaldo-Figueroa's expectations of section 212(c)'s availability were likely disrupted when he became ineligible for section 212(c) relief nearly five years after his plea. Petitioner, on the other hand, had notice at the time of her plea that discretionary relief would be unavailable because IIRIRA had already been passed. As stated strongly in *Velasco-Medina*, any expectation that petitioner might have had of continued eligibility for a discretionary removal waiver relief was "neither reasonable nor settled." 305 F3d at 850.

Petitioner cites no authority beside *Ubaldo-Figueroa* to support her due process argument. Because the section 321 due process analysis in

Ubaldo-Figueroa is contained within a concurring opinion and the facts are distinguishable from petitioner's case, the court rejects petitioner's argument that application of IIRIRA violates due process in her case.

VI

Based on the foregoing analysis, the court LIFTS the stay (Doc # 21). The court STAYS this order for sixty days to allow petitioner to pursue appellate relief, if she so desires. The clerk is DIRECTED to close the file and terminate all pending motions.

IT IS SO ORDERED.

/s/ V. Walker
VAUGHN R WALKER
United States District Judge

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A92 177 125 – San Francisco

Date: OCT 25 1999

In re: MARIA SOCORRO *AGASINO*
a.k.a. Maria Agasino

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Karen R. Seiden, Esquire
Post Office Box 879
San Jose, California 95106

ON BEHALF OF SERVICE: Michael N. Spargo
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Cancellation of Removal; waiver of inadmissibility

In a decision dated May 20, 1999, the Immigration Judge found the respondent removable as charged and denied her applications for relief.[1] The

[1] We note that there was no separate oral decision from the Immigration Judge. Rather, it was embedded in the transcript of the hearing. Nevertheless, we find this format adequate because

(Continued on following page)

respondent has appealed. The appeal will be dismissed.

The respondent is a native and citizen of the Philippines. Her lawful permanent residence in this country began on an unknown date in 1970. The record reflects that the respondent was convicted, on March 10, 1997, of grand theft embezzlement, and sentenced to a period of incarceration of 3 years. (Exh. 2). Accordingly, we find that she was convicted of an aggravated felony under section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G).

To the extent the respondent is seeking relief from deportation under section 212(c) of the Act, 8 U.S.C. § 1182(c), we note that this relief is no longer part of the Act, as it was repealed and is not available in removal proceedings. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Pub. L. No. 104-208, 110 Stat. 3009-549, 3009-689 (enacted Sept. 30, 1996) (IIRIRA). Her arguments concerning the retroactive application of certain aspects of recent changes in the immigration laws are not applicable to this case as the Notice to Appear was issued on April 14,

---

the respondent had notice of the factual and legal basis of the decision and had an adequate opportunity to contest them on appeal, the uncontested facts established at the hearing are dispositive of the issues raised on appeal, and the hearing was fundamentally fair. *Matter of Rodriguez*, Interim Decision 3413 (BIA 1999).

1999, well after the effective dates of the new laws. Therefore, we do not need to address further the respondent's appellate arguments regarding section 212(c) relief.

Furthermore, an alien convicted of an aggravated felony is not eligible for cancellation of removal. Sections 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3). Finally, we note that we have no jurisdiction to rule on the constitutionality of laws enacted by Congress. *Matter of Fuentes-Campos*, Interim Decision 3318 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

Accordingly, the respondent's appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

IMMIGRATION COURT
[illegible]0 KEARNY ST., SUITE 800
SAN FRANCISCO, CA 94108

In the Matter of

AGASINO, MARIA SOCORRO
Respondent

Case No.:
A92-177-125

IN REMOVAL
PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on May 20, 1999.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to PHILIPPINES or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to PHILIPPINES or in the alternative to

[ ] Respondent's application for voluntary departure was granted until ___ upon posting a bond in the amount of $ _____with an alternate order of removal to PHILIPPINES.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[X] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted (X) denied [pretermitted] ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section ____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $ ___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[X] Other: [§ 212(c) application was pretermitted].

Date: May 20, 1999

Appeal: RESERVED Appeal Due By: Jun 21, 1999

/s/ Polly A. Webber
POLLY A. WEBBER
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of File A 92 177 125

MARIA SOCORRO AGASINO) In REMOVAL
) Proceedings
)
Respondent) Transcript of Hearing

Before POLLY A. WEBBER, Immigration Judge

Date: May 20, 1999 Place: San Francisco, California

Transcribed by FREE STATE REPORTING, INC., at Annapolis, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Jim Stolley	Karen Seiden

[1] JUDGE FOR THE RECORD

This is Immigration Judge Polly A. Webber in removal proceedings on May 20, 1999, San Francisco. This case is regarding Maria Socorro Agasino, file number A 92 177 125. Would counsel please state your appearances for the record.

MS. SEIDEN TO JUDGE

Karen Seiden for respondent.

MR. STOLLEY TO JUDGE

Jim Stolley for the Service.

JUDGE TO MS. SEIDEN AND MR. STOLLEY

Good, good morning to you both, and I see that we have Ms. Agasino present in the custody of the Immigration and Naturalization Service.

JUDGE TO MS. AGASINO

Q. Ms. Agasino, are you going to speak in English?

A. Yes.

Q. Could you stand please. Do you swear to tell the truth, the whole truth and nothing but the truth today in Court?

A. Yes.

Q. All right. Do you wish to have Ms. Seiden represent you today?

A. Yes.

Q. All right. You can be seated. Tell me your full name.

A. Maria Socorro Agasino.

Q. All right. Thank you.

[2] JUDGE TO MS. SEIDEN

Ms. Seiden, have you read the Notice to Appear?

MS. SEIDEN TO JUDGE

Yes, Your Honor.

JUDGE TO MS. SEIDEN

Do you concede it was properly served on the respondent?

MS. SEIDEN TO JUDGE

Yes.

JUDGE TO MS. SEIDEN

Do you waive reading of the Notice to Appear and reading of rights?

MS. SEIDEN TO JUDGE

Yes, Your Honor.

JUDGE TO MS. SEIDEN

How do you plead?

MS. SEIDEN TO JUDGE

At this time we admit allegations 1, 2 and 3, deny allegation 4 and deny removability at this time.

JUDGE TO MS. SEIDEN

All right.

JUDGE TO MR. STOLLEY

Mr. Stolley –

JUDGE FOR THE RECORD

I'm going to mark the Notice to Appear as Exhibit 1.

JUDGE TO MS. STOLLEY

[3] – do you have the conviction documents, sir?

MR. STOLLEY TO JUDGE

Yes, I would like to swear respondent in since she's denying this.

JUDGE TO MR. STOLLEY

I did swear her in.

MR. STOLLEY TO JUDGE

Oh, okay.

JUDGE TO MS. AGASINO

Q. Ma'am, could I ask you some questions?

A. Yes.

Q. Were you convicted in Superior Court, California, Santa Clara, on March 10th, 1987 –

A. Yes.

Q. – for –

A. 1987, no.

Q. – 1997 –

A. '97.

Q. – for various offenses, including grand theft, attempted grand theft (indiscernible)?

A. Yes.

Q. Grand theft embezzlement, false impersonation, false financial statement?

MS. SEIDEN TO MS. AGASINO

Only answer if you know the answer.

[4] MS. AGASINO TO MR. STOLLEY

A. Yes.

Q. Okay.

MR. STOLLEY TO JUDGE

And Your Honor, I do have certified copies of the conviction documents that corroborate her testimony. I will (indiscernible).

JUDGE TO MR. STOLLEY

All right. Well based upon the documents – well let me take a look at the documents – from the testimony I will sustain allegation No. 4 and –

MS. SEIDEN TO JUDGE

Your Honor, the contention was allegation No. 4 is having to do with the commission date.

MR. STOLLEY TO JUDGE

This was (indiscernible) what is the commission date?

MS. SEIDEN TO JUDGE

The stated commission date is on or about August 8th, 1995.

MR. STOLLEY TO JUDGE

I don't have that one.

JUDGE TO MS. SEIDEN

No, it says the commission, the commission of the crime was August 8, '95. The –

MS. SEIDEN TO JUDGE

'95, yeah.

[5] JUDGE TO MS. SEIDEN

– the conviction was March 10th.

MS. SEIDEN TO JUDGE

Uh-huh. That's what I said, commission –

JUDGE TO MS. SEIDEN

Okay.

MS. SEIDEN TO JUDGE

– not conviction.

JUDGE TO MS. SEIDEN

Oh, I thought you said –

MS. SEIDEN TO JUDGE

No.

JUDGE TO MS. SEIDEN

– conviction.

MS. SEIDEN TO JUDGE

No, no, no.

JUDGE TO MS. SEIDEN

Okay.

MS. SEIDEN TO JUDGE

That's –

MR. STOLLEY TO JUDGE

(indiscernible).

MS. SEIDEN TO JUDGE

– that's our problem with that allegation only because we haven't been able to verify that part of the allegation, [6] therefore, we're not going to concede to the allegation.

MR. STOLLEY TO JUDGE

Well, it's (indiscernible).

MS. SEIDEN TO JUDGE

This is the first time I've –

JUDGE TO MS. SEIDEN

We'll go off the record and give you a chance to take a look at that.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

All right. We're back on the record. Mr. Stolley has provided the Court not only with the abstractive judgement relating to these various charges and convictions, including the one alleged in the NTA and I do have the felony complaint which indicates that the actions cited were evidently undertaken between July 12th, 1993 and August 8, 1995.

JUDGE TO MS. SEIDEN

With that document, I don't know if you wish to be heard still on this issue, Ms. Seiden before I –

MS. SEIDEN TO JUDGE

With that document we would then concede allegation 4.

JUDGE TO MS. SEIDEN

– all right. I'm – it's conceded and I'm sustaining it and this – these documents will be Exhibit 2.

[7] MS. SEIDEN TO JUDGE

Okay. We would still, Your Honor, deny that my client's removable at this time based on constitutional due process claims having to do with the retroactivity of the laws involved here. Her actions were taken on August 8th, 1995.

JUDGE TO MS. SEIDEN

You mean because that was before AEDPA –

MS. SEIDEN TO JUDGE

It was before –

JUDGE TO MS. SEIDEN

– and IIRIRA?

MS. SEIDEN TO JUDGE

– yes, Your Honor.

JUDGE TO MS. SEIDEN

All right. Did you want to expand that argument at all before, before I –

MS. SEIDEN TO JUDGE

Before you tell me that you can't hear it.

JUDGE TO MS. SEIDEN

– before I tell you what my jurisdiction is? Are you just, are you just making your –

MS. SEIDEN TO JUDGE

I'm just setting it out –

JUDGE TO MS. SEIDEN

-- statement for the record.

[8] MS. SEIDEN TO JUDGE

– for the – yeah.

JUDGE TO MS. SEIDEN

All right.

MS. SEIDEN TO JUDGE

Just for the record, Your Honor.

JUDGE TO MS. SEIDEN

All right.

JUDGE TO MR. STOLLEY

Is there anything that the Service wishes to comment?

MR. STOLLEY TO JUDGE

Only that it's not necessary to set any constitutional argument out for the record since neither you nor the Board has cognizance to those issues. So, there's nothing to preserve. Could I ask what relief we're looking for here, if any?

JUDGE TO MR. STOLLEY

Right, but I – let me just respond to Ms. Seiden's statement with regard to constitutional issues.

JUDGE TO MS. SEIDEN

That they are outside of this Court's jurisdiction as this Court understands it's charge and as the law in place at the – this time appears to apply retroactively I'd have to sustain the aggravated felony charge. I am aware that there's some movement on this issue in other District Courts within the 9th Circuit. At best that's about all I can say on that issue. Are you going [9] to be seeking any relief, Ms. Seiden?

MS. SEIDEN TO JUDGE

Not at – it's made difficult by the fact that the constitutional issue cannot be argued of course here. This obviously goes beyond the whole idea of 212(c) for those in deportation as my client is in removal. I would ask that she be allowed to file for 212(c).

JUDGE TO MS. STOLLEY

Does the Service wish to be heard?

MR. STOLLEY TO JUDGE

Yes, Your Honor. Pretermit now, she's not eligible to file for 212(c). She's not in deportation or exclusion, she's in removal.

JUDGE TO MS. SEIDEN

On the same set of circumstances, Ms. Seiden, I believe it's outside of this Court's jurisdiction at this point to entertain a 212(c) application so I'll have to pretermit. Is there anything else?

MS. SEIDEN TO JUDGE

Nothing from our side, Your Honor.

JUDGE TO MS. SEIDEN

All right.

JUDGE TO MS. SEIDEN AND MR. STOLLEY

Anything further from either party before I rule?

MR. STOLLEY TO JUDGE

[10] No, Your Honor.

MS. SEIDEN TO JUDGE

You know, excuse me, Your Honor, based on the fact that we're denying that she's removable as charged, I would ask that she be allowed then to file for cancellation of removal for certain permanent residents since that is available under removal and she is a very long term permanent resident.

JUDGE TO MS. SEIDEN

All right. My pretermission of the request to file the cancellation of removal application under Section 240A(a) of the Act is based on respondent's having been found by clear and convincing evidence to have –

to be removable by virtue of her aggravated felony conviction making her not qualified for cancellation of removal under that Section. I would note, however, that if the Court of jurisdiction over issues of constitutionality ruled that retroactivity should not reach people who've committed their acts before the legislation went into effect, I would certainly entertain a revisitation of this issue.

MS. SEIDEN TO JUDGE

Thank you, Your Honor.

JUDGE TO MS. SEIDEN

Okay.

JUDGE FOR THE RECORD

That being the case the following is the finding of the [11] Court as well as the ruling. This respondent is an adult female, a native and citizen of the Philippines who has admitted the factual allegations in the Notice to Appear and while she has denied removability the Court has sustained the ground alleged as a person convicted of an aggravated felony under Section 237(a)(2)(A)(iii) of the Act. I find therefore that removability has been demonstrated by clear and convincing evidence as required by Section 240(c) of the Act. In lieu of removal respondent requested that the Court entertain applications for cancellation of removal under Section 240A(a) of the Act as well as waiver of excludability under Section 212(c) of the former Act. The Court has found no jurisdiction to entertain either application as the clear application of

law in this circuit at this time would not permit such an application. For all the foregoing reasons the following is the order of this Court. It is hereby ordered that the respondent, Maria Socorro Agasino be removed to the Philippines. From this decision either party may appeal.

JUDGE TO MS. SEIDEN

Ms. Seiden?

MS. SEIDEN TO JUDGE

I would reserve appeal, Your Honor.

JUDGE TO MS. SEIDEN

So noted.

JUDGE TO MR. STOLLEY

[12] Mr. Stolley?

MR. STOLLEY TO JUDGE

Waive.

JUDGE TO MR. STOLLEY

All right.

JUDGE TO MS. SEIDEN

Your appeal is due in 30 days, Ms. Seiden and I'll tell you what that date is in just a minute. I belief that would be June 21st because the 30th day falls on a weekend.

JUDGE TO MS. SEIDEN AND MR. STOLLEY

Is there anything further from either party?

MR. STOLLEY TO JUDGE

No, Your Honor.

MS. SEIDEN TO JUDGE

Nothing, Your Honor.

JUDGE FOR THE RECORD

All right then. We'll make a written memorandum of the oral decision to serve on the parties and I'll note if no appeal is received by the Board by the 21st of June, 199 that my decision will be final. The hearing is adjourned.

HEARING CLOSED

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE POLLY A. WEBBER, in the matter of:

MARIA SOCORRO AGASINO

A 92 177 125

San Francisco, California

is an accurate, verbatim transcript of the cassette tape as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Jennifer Jennings
Jennifer Jennings,
Transcriber

Free State Reporting, Inc.
1324 Cape St. Claire Road
Annapolis, Maryland 21401
(301) 261-1902

July 20, 1999
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA SOCORRO AGASINO, Petitioner-Appellant, v. COUNTY OF SANTA CLARA; CHARLES H. DEMORE; STATE OF CALIFORNIA, Respondents-Appellees.	No. 04-16038 D.C. No. CV-00-02253-VRW Northern District of California, San Francisco ORDER (Filed May 5, 2008)

Before: FERGUSON, NOONAN, and RYMER, Circuit Judges.

The panel has unanimously voted to grant the petition for rehearing. The petition for rehearing is GRANTED.

The Memorandum Disposition filed August 24, 2005, is WITHDRAWN. A new memorandum disposition is filed simultaneously with this order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA SOCORRO AGASINO, Petitioner-Appellant, v. COUNTY OF SANTA CLARA; CHARLES H. DEMORE; STATE OF CALIFORNIA, Respondents-Appellees.	No. 04-16038 D.C. No. CV-00-02253-VRW Northern District of California, San Francisco ORDER (Filed Sep. 17, 2008)

Before: FERGUSON,* NOONAN, and RYMER, Circuit Judges.

The panel has unanimously voted to deny appellant's petition for rehearing. Judge Rymer voted to deny the petition for rehearing en banc and Judge Noonan recommended denial of the petition for rehearing en banc. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

---

* Because of the death of Judge Ferguson, the petition for rehearing was considered and acted upon by the two other members of the panel.

OPPOSITION BRIEF

FILED
MAY 26 2009

No. 08-785

In the Supreme Court of the United States

MARIA SOCORRO AGASINO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

In 1996, Congress amended Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), which had provided for a discretionary waiver of deportation, by making it unavailable to aliens convicted of aggravated felonies and then by repealing it altogether. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that the repeal of Section 212(c) did not apply retroactively to an alien previously convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The questions presented are:

1. Whether the court of appeals violated due process by failing to address a non-jurisdictional argument that petitioner failed to raise in her opening brief or reply brief.

2. Whether, for purposes of the retroactive availability of relief under former Section 212(c), it violates the equal protection component of the Due Process Clause to distinguish between aliens who were deportable and those who were not when they pleaded guilty to a crime that was later retroactively made an aggravated felony.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statement 2
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Cordes v. *Gonzales*, 421 F.3d 889 (9th Cir. 2005), vacated, 517 F.3d 1094 (9th Cir. 2008) 1, 6, 9, 10
Cordes v. *Mukasey*, 517 F.3d 1094 (9th Cir. 2008) 7
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 9
INS v. *St. Cyr*, 533 U.S. 289 (2001) 2, 3, 4
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 9
Tuan Anh Nguyen v. *INS*, 533 U.S. 53 (2001) 11
United States v. *Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002), cert. denied, 540 U.S. 1210 (2004) 5

Statutes and rule:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 2
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat 3009-546:
§ 304(b), 110 Stat. 3009-597 2
§ 309(a), 110 Stat. 3009-625 3
§ 321(a)(3), 110 Stat. 3009-627 3
§ 321(b), 110 Stat. 3009-628 3

Statutes and rule—Continued: Page

Immigration and Nationality Act, 8 U.S.C. 1101 *et. seq.*:
8 U.S.C. 1101(a)(43) 3
8 U.S.C. 1101(a)(43)(G) 3, 4
8 U.S.C. 1101(a)(43)(G) (1994) 3
8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*
8 U.S.C. 1227(a)(2)(A)(iii) 4
8 U.S.C. 1229b (§ 240A) 2
8 U.S.C. 1252 6
REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 6
S. Ct. R. 10(a) 9

Miscellaneous:

16AA Charles Alan Wright et al., *Federal Practice and Procedure* (4th ed. 2008) 8

In the Supreme Court of the United States

No. 08-785

MARIA SOCORRO AGASINO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The initial memorandum opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted in 142 Fed. Appx. 309.* The opinion of the court of appeals on rehearing (Pet. App. 1-6) is not published in the *Federal Reporter* but is available at 2008 U.S. App. LEXIS 9824. The orders of the district court (Pet. App. 10-27), the Board of Immigration Appeals (Pet. App. 28-30), and the immigration judge (Pet. App. 31-33) are unreported.

* The petition appendix reprints the court of appeals' August 16, 2005 opinion (Pet. App. 7-9) but includes the notation (Pet. App. 7) that the August 16 opinion was withdrawn on August 24, 2005. On August 24, 2005, the opinion was reissued in materially identical form, with updated citations to a substituted opinion in *Cordes* v. *Gonzales*, 421 F.3d 889 (9th Cir. 2005). See 142 Fed. Appx. 309.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2008. A petition for rehearing was denied on September 17, 2008 (Pet. App. 51). The petition for a writ of certiorari was filed on December 16, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized some permanent resident aliens domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was generally construed as being applicable in both deportation and exclusion proceedings. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In 1996, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, Congress amended Section 212(c) to make ineligible for discretionary relief aliens previously convicted of an aggravated felony. See *St. Cyr*, 533 U.S. at 297 n.7. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, Congress repealed Section 212(c) in its entirety, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which now provides for a form of discretionary relief known as cancellation of removal. That relief is not available to many criminal aliens, including those who have been convicted of an aggravated felony.

In IIRIRA, Congress also expanded the definition of "aggravated felony." As relevant here, before IIRIRA, "a theft offense" met the definition only if it resulted in a term of imprisonment of at least five years. See 8 U.S.C. 1101(a)(43)(G) (1994). After IIRIRA, however, the term-of-imprisonment threshold for theft offenses was only one year. IIRIRA § 321(a)(3), 110 Stat. 3009-627; 8 U.S.C. 1101(a)(43)(G). Although IIRIRA was enacted on September 30, 1996, it generally did not take effect until April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. Nevertheless, Congress expressly made IIRIRA's revisions of the aggravated-felony definitions applicable "regardless of whether the conviction was entered before, on, or after" IIRIRA's date of enactment. IIRIRA § 321(b), 110 Stat. 3009-628; see 8 U.S.C. 1101(a)(43) (final sentence) ("Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996."); see also *St. Cyr*, 533 U.S. at 318-319 (identifying IIRIRA's "amendment of the definition of 'aggravated felony'" as a "specific provision[]" for which Congress "indicate[d] unambiguously its intention" that it be applied "retroactively").

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. In particular, the Court in *St. Cyr* explained that, before 1996, aliens who decided "to forgo their right to a trial" by pleading guilty to an aggravated felony "almost certainly relied" on the chance that, not-

withstanding their convictions, they would still have some "likelihood of receiving § 212(c) relief" from deportation. *Id.* at 325.

2. a. Petitioner is a native and citizen of the Philippines who became a lawful permanent resident of the United States in 1970. Pet. App. 29. On March 10, 1997 —after IIRIRA was enacted, but about three weeks before its effective date—she pleaded no contest to a charge of grand theft embezzlement and was sentenced to a three-year term of imprisonment. *Id.* at 10, 29. The former Immigration and Naturalization Service issued a Notice to Appear on May 6, 1998, which was served on petitioner on April 14, 1999, Admin. R. 100-101, alleging that petitioner was removable as an alien who had been convicted of an aggravated felony. Pet. App. 28; see 8 U.S.C. 1101(a)(43)(G), 1227(a)(2)(A)(iii).

On May 20, 1999, an immigration judge (IJ) found petitioner removable on the charged ground. Pet. App. 31, 46. The IJ held that petitioner was not "qualified" for cancellation of removal because of her aggravated-felony conviction. *Id.* at 32, 45-46. Because IIRIRA had repealed Section 212(c), the IJ also pretermitted petitioner's application for that relief. *Id.* at 46-47.

b. On October 25, 1999, the Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 28-30. The Board found (*id.* at 29) that petitioner had been convicted of an aggravated felony under 8 U.S.C. 1101(a)(43)(G), which defines "aggravated felony" as including "a theft offense * * * for which the term of imprisonment [is] at least one year." The Board also concluded that petitioner could not receive relief from deportation under Section 212(c) because that provision had been repealed by IIRIRA, and that her arguments against "retroactive application of certain aspects

of recent changes in the immigration laws" were inapplicable because her removal proceeding was initiated "well after the effective dates of the new laws." Pet. App. 29-30.

3. In June 2000, petitioner challenged her detention in a habeas corpus petition in the United States District Court for the Northern District of California and sought an emergency stay of removal. Pet. 7. The district court issued a temporary stay in September 2000 but lifted the stay in April 2004, in light of the Ninth Circuit's decision in *United States* v. *Velasco-Medina*, 305 F.3d 839 (2002), cert. denied, 540 U.S. 1210 (2004), which held that Section 212(c) relief was not available to an alien whose plea and conviction occurred after AEDPA but before IIRIRA. Pet. App. 10-11. As the district court explained, petitioner's argument against the retroactive application of IIRIRA's restrictions on Section 212(c) eligibility was "even weaker than Velasco-Medina's, because petitioner pled guilty after IIRIRA was passed," *id.* at 21, and she thus had notice at the time of her plea that she was being convicted of an offense that would, when IIRIRA took effect a few weeks later, be retroactively defined as an aggravated felony that made her both deportable and ineligible for relief from removal. See *id.* at 22 (noting that courts had "consistently held that Congress expressly directed that" IIRIRA's amendments to the aggravated-felony definition "operate[] retroactively"). The district court thus rejected petitioner's argument that the retroactive application of IIRIRA would violate her due process rights. *Id.* at 24-27. As the court explained in part, petitioner had no "settled expectations regarding the availability of [S]ection 212(c) relief" when she entered her plea, since she "had notice at the time of her plea that discretionary

relief would be unavailable because IIRIRA had already been passed." *Id.* at 26.

4. a. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, repeating her non-retroactivity arguments. See Pet. 8-9. While the appeal was pending, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302. Pet. 9 n.1. Pursuant to the REAL ID Act, which amended 8 U.S.C. 1252, the court of appeals converted the habeas appeal to a petition for review. Pet. 9 n.1.

b. At oral argument in April 2005, judges on the Ninth Circuit panel deciding petitioner's case raised an equal protection issue akin to one that was being argued in another case before the same panel on the same day. See Pet. 10, 13 (noting that the issue was raised by the court at oral argument); compare Pet. App. 1, 7 (listing April 11, 2005 argument date and panel members), with *Cordes* v. *Gonzales*, 421 F.3d 889, 889, 891 (9th Cir. 2005) (same), vacated, 517 F.3d 1094 (9th Cir. 2008).

c. In August 2005, the court of appeals decided both cases. In *Cordes*, it held that it would violate the equal protection component of the Due Process Clause to deny eligibility for Section 212(c) relief to certain aliens who pleaded guilty, after AEDPA was enacted, to offenses that were later made an aggravated felony by IIRIRA. See 421 F.3d at 893, 896-899. Judge Rymer dissented from the equal protection holding in *Cordes*. *Id.* at 899-900.

In petitioner's case, the court issued a memorandum disposition. Pet. App. 7-9. The majority found petitioner's case to be "materially indistinguishable from" that of the alien in *Cordes*, and it remanded to the Board "for reconsideration consistent with that opinion." *Id.* at 8-9. Judge Rymer dissented "for the same reasons" as in

Cordes and also "for the additional reason that [petitioner] does not raise an equal protection challenge on appeal." *Id.* at 9.

d. The government sought rehearing in this case and also asked that it be held while it sought rehearing en banc in *Cordes*. In February 2008, the court of appeals vacated its earlier decision in *Cordes* on the ground that it had lacked jurisdiction to decide the case at the time it issued its August 2005 opinion. See *Cordes* v. *Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008).

e. On May 5, 2008, the panel in this case unanimously granted the government's rehearing petition and withdrew its August 2005 decision. Pet. App. 50. On the same day, it issued a new memorandum disposition denying petitioner relief. *Id.* at 1-6. The majority expressly addressed and rejected the arguments petitioner had made in her briefs on appeal, *id.* at 2, but it did not address the equal protection issue that had been raised by the court at oral argument and decided in the vacated opinion in *Cordes*.

Judge Ferguson dissented, contending that the panel should not "abandon [the] reasoning" of the "equal protection rationale that served as the foundation of [the court's] grant of relief" in the pre-vacatur *Cordes* opinion. Pet. App. 3.

ARGUMENT

Petitioner contends (Pet. 11-14) that the court of appeals violated her due process rights by failing to address an equal protection argument that she did not raise in her briefs but made only after the judges themselves raised the issue at oral argument. Petitioner also claims (Pet. 15-19) that, if the equal protection issue were to be addressed, she should prevail on the merits.

The court of appeals did not err in failing to address the issue petitioner had not presented in her briefs, and petitioner's equal protection argument in any event lacks merit. Moreover, petitioner has not identified, and cannot identify, any conflict in the courts of appeals on either issue.

1. Petitioner contends that the court of appeals "violated due process of law" (Pet. 12) by failing to resolve an argument that petitioner concedes (Pet. 10, 13) was first raised *by the court* during oral argument. It is, however, well established that courts of appeals are not compelled to address non-jurisdictional arguments that a party seeking appellate review forfeits by leaving them unmentioned in her briefs, see, *e.g.*, 16AA Charles Alan Wright et al., *Federal Practice and Procedure* § 3974.1, at 232-243 & nn.13-19 (4th ed. 2008) (citing cases), and petitioner cites no contrary authority. Nor does she explain why that principle does not apply equally to a forfeited issue that a court initially chooses to address but then decides, upon rehearing, not to address.

Although petitioner says that the court of appeals here "gave no reason for overturning its previous findings respecting Equal Protection," Pet. 14, there is an obvious difference between exercising judicial discretion to remand on the basis of a forfeited argument that has actually been resolved by a published opinion in another case (as in the panel's initial decision), and choosing to address a forfeited argument when there is no other opinion on point (as petitioner claims should have happened upon rehearing). Accordingly, the court of appeals' failure to address petitioner's equal protection argument in its opinion on rehearing neither warrants further review nor departs "so far * * * from the ac-

cepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

2. Petitioner also contends (Pet. 15-19) that this Court should address the merits of the equal protection issue that went undecided in the court of appeals. "This Court, however, is one of final review, not of first view." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (internal quotation marks omitted). Moreover, petitioner's equal protection argument lacks merit and has not occasioned any conflict in the courts of appeals.

a. Petitioner argues (Pet. 15-19) that denying her eligibility for Section 212(c) relief violates equal protection because it rests on an irrational distinction among aliens on the basis of whether they were deportable at the time they pleaded guilty to crimes that later made them ineligible for Section 212(c) relief.

The only support petitioner invokes (Pet. 18) for her novel equal protection argument is the Ninth Circuit's opinion in *Cordes* v. *Gonzales*, 421 F.3d 889 (9th Cir. 2005), vacated, 517 F.3d 1094 (9th Cir. 2008). Petitioner notes (Pet. 18) that *Cordes* was vacated on other grounds, but this Court has made clear that a vacated decision still lacks precedential force. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 117 (1943). There is thus no conflict—not even an intra-circuit conflict—on the second question presented.

b. Nor does petitioner's underlying argument have merit. Petitioner concedes (Pet. 16) that "federal classifications distinguishing among groups of aliens * * * are valid unless 'wholly irrational.'" The *Cordes* majority had reasoned that it was irrational to distinguish between serious criminals who were eligible to seek Sec-

tion 212(c) relief under this Court's *St. Cyr* decision if they pleaded guilty before AEDPA was enacted, and less-serious criminals, like Cordes, who pleaded guilty before IIRIRA was enacted and retroactively made their crimes "aggravated felon[ies]." *Cordes*, 421 F.3d at 893, 896-899. Yet, as Judge Rymer explained when dissenting in *Cordes*:

> It is rational to distinguish between aliens who were deportable and those who were not when they entered a plea of guilty to a crime that IIRIRA retroactively makes an aggravated felony because those who * * * were not deportable could *not* have relied on the availability of § 212(c) relief, whereas those who * * * *were* deportable *could* have relied on that possibility.

Id. at 899.

c. Finally, even if there were some basis for the rationale of the vacated majority opinion in *Cordes*, petitioner's case would be a poor vehicle for reviewing that rationale because the facts of her case are readily and materially distinguishable even from those in *Cordes*. The purportedly irrational distinction in *Cordes* arose from allowing an alien who pleaded guilty before AEDPA to be eligible for Section 212(c) relief but denying such relief to an alien who pleaded guilty after AEDPA.

Although petitioner groups herself with aliens who pleaded "guilty to convictions that did not render them deportable at the time of conviction, but who later became deportable when their convictions were reclassified as aggravated felonies by IIRIRA," Pet. 17, she is not situated similarly to the aliens discussed in *Cordes*. Both Cordes and aliens (like those in *St. Cyr*) who en-

tered guilty pleas before AEDPA rendered Section 212(c) relief unavailable to them could arguably have been taken unaware by changes to Section 212(c) that were made after they entered their pleas. That is not, however, true for petitioner. To the contrary, as the district court explained in resolving petitioner's due process and retroactivity arguments, petitioner entered her plea after IIRIRA had already amended the definition of aggravated felony (and expressly stated that the revised definition would apply retroactively). Pet. App. 21-22, 26.

Because petitioner entered her guilty plea after IIRIRA was enacted, she was not denied eligibility for Section 212(c) relief "solely on the fortuity of whether [she was] deportable at the time that [she] pled guilty." Pet. 15; see also Pet. 18. At the time of her plea, she was on notice that the resulting theft conviction could render her deportable when IIRIRA's expressly retroactive definition of aggravated felony took effect a few weeks later. Thus, even if it were irrational—as the vacated *Cordes* opinion held—to distinguish between aliens who were deportable and those who were not when they entered a plea of guilty to a crime that IIRIRA retroactively made an aggravated felony, it would not be irrational to distinguish all of those aliens from the category of aliens who (like petitioner) were not yet deportable when they entered their pleas but already had reason to know that they shortly *would* be deportable. Because petitioner is thus not "similarly situated" with the aliens in *St. Cyr* or *Cordes*, there is no equal protection violation here. *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 63 (2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

MAY 2009